UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Las Vegas Cogeneration, L.P.	Docket No. EL03-191-000
Montana Power Company	Docket No. EL03-194-000
PECO Energy Company	Docket No. EL03-198-000
Valley Electric Association, Inc.	Docket No. EL03-203-000

ORDER GRANTING MOTIONS TO DISMISS SHOW CAUSE PROCEEDINGS

(Issued March 3, 2004)

Introduction

1. In this order, we conditionally grant Commission Trial Staff's motions to dismiss certain dockets instituted in the show cause proceeding established by the Partnership Gaming Order. [1]

Background

Partnership Gaming Order

2. In the Partnership Gaming Order, the Commission explained that, based on the Final Report submitted by Commission Advisory Staff, and evidence and comments submitted by market participants, it appeared that Enron Power Marketing, Inc. and Enron Energy Services Inc. (collectively, Enron) and a number of entities identified in the order (collectively, Partnership Entities) worked in concert through partnerships,

[1] Enron Power Marketing Inc., et al., 103 FERC ¶ 61,346 (2003), reh'g denied, 106 FERC ¶ 61,021 (2003) (Partnership Gaming Order).

alliances or other arrangements (jointly, Partnerships) to engage in activities that constitute gaming and/or anomalous market behavior (Gaming Practices) in violation of the California Independent System Operator Corporation's (ISO) and the California Power Exchange's (PX) tariffs during the period of January 1, 2000 to June 20, 2001.[2] The order also found that there was evidence that a number of Partnership Entities appear to have had similar Partnerships, which could be attempts to engage in similar activities.

3. In the Partnership Gaming Order, the Commission directed the identified entities, in a trial-type evidentiary hearing to be held before an administrative law judge (ALJ), to show cause why their behavior, as set forth in the order, during the period January 1, 2000 to June 20, 2001 does not constitute gaming and/or anomalous market behavior as defined in the ISO and PX tariffs. Further, the Commission directed the ALJ to hear evidence and render findings and conclusions quantifying the full extent to which the identified entities may have been unjustly enriched as a result of their conduct, and to recommend a monetary remedy of disgorgement of unjust profits and any other additional, appropriate non-monetary remedies.

Motions to Dismiss

4. As the result of Trial Staff's investigation, which included examining data responses, conducting conferences, and examining the ISO's submissions, Trial Staff filed motions to dismiss and requests to terminate Docket Nos. EL03-191-000, EL03-194-000, EL03-198-000, and EL03-203-000.[3]

Responses

5. Public Service Company of New Mexico (PSCNM) was the only party to file comments in any of the four dockets. PSCNM filed a response supporting Trial Staff's motion to dismiss in Docket No. EL03-198-000.

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[2] The Partnership Gaming Order adopted the definitions of Gaming Practices stated in American Electric Power Service Corporation, et al., 103 FERC ¶ 61,345, reh'g denied, 106 FERC ¶ 61,021(2003) (Gaming Practices Order), which was issued contemporaneously.

[3] Trial Staff filed similar motions to terminate the dockets and to dismiss show cause proceedings resulting from the Partnership Gaming Practices Order in Docket Nos. EL03-185-000, EL03-187-000, EL03-188-000, EL03-189-000, EL03-190-000, EL03-192-000, EL03-197-000, and EL03-202-000. These motions were granted in Colorado River Commission of Nevada, et al., 106 FERC ¶ 61,022 (2003) (CRC).

Discussion

Trial Staff Motions to Dismiss and Response

Docket No. EL03-191-000 – Las Vegas Cogeneration, L. P.

6. In the Partnership Gaming Order, the Commission stated that Las Vegas Cogeneration, L. P. (LVCLP), appeared to have engaged, through a partnership, alliance or other arrangement with Enron, in Gaming Practices in violation of the ISO and PX tariffs and established Docket No. EL03-191-000.[4] The order suggested that LVCLP may have entered into arrangements with Enron that caused its behavior during the relevant period to have constituted gaming and/or anomalous market behavior under the ISO and PX Tariffs.

7. Trial Staff filed a motion to dismiss the show cause proceeding against LVCLP subject to conditions that LVCLP and the California Parties[5] agreed to, as memorialized in a December 19, 2003 letter agreement.[6]

8. Trial Staff states that its investigation did not reveal any evidence that LVCLP engaged in any gaming practices with Enron nor had any knowledge of Enron's practices in selling power.[7]

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[4] See id. Partnership Gaming Order, 103 FERC ¶ 61,346 at P 1, 30, 45.

[5] The California Parties are the People of the State of California ex rel. Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Pacific Gas and Electric Company, and Southern California Edison Company.

[6] In the December 19, 2003 letter agreement the California Parties agree not to oppose the Trial Staff motion to dismiss, provided LVCLP agrees to: (1) remain a party to the show cause proceeding; and (2) use its best efforts to provide full and complete responses to proper requests for relevant discovery from the California Parties in connection with the proceeding pursuant to the established schedule. LVCLP further agrees that : (1) if the scope of the proceedings is enlarged, then the California Parties will not be precluded from advocating or the Commission from applying any newly imposed rules, standards, or remedies to LVCLP; (2) dismissal does not resolve any issues raised in other dockets or in Trial Staff investigations (both docketed and un-docketed); and (3) dismissal of this docket does not preclude the Commission from ordering any appropriate remedy as to LVCLP or others in any other proceeding.

[7] See Trial Staff Motion at P 3.7.

9. Trial Staff also points out that the California Parties' witness, Dr. Peter Fox-Penner (in Docket No. EL00-95-075, et al.) did not identify LVCLP as having engaged in or facilitated any of the alleged Gaming Practices.

10. Finally, Trial Staff supports dismissal by pointing out that the ISO did not include LVCLP on the list of entities having engaged in a Gaming Practice; the Commission did not include LVCLP in the show cause proceeding established by the Gaming Practices order; and the California Parties have formally agreed not to oppose the motion to dismiss.[8]

Docket No. EL03-194-000 – Montana Power Company

11. In the Partnership Gaming Order, the Commission determined that Montana Power Company (MPC) appeared to have engaged, through a partnership, alliance, or other arrangement with Enron, Gaming Practices in violation of the ISO and PX Tariffs and established Docket No. EL03-194-000.[9]

12. After examining the record, Trial Staff concluded that the Master Energy Purchase and Sale Agreement that MPC entered into with Enron was for the purpose of providing system balancing services to MPC.[10] Trial Staff also points out that MPC's generating capacity remaining after the sale to PPLM was used for legitimate business purposes and did not involve any partnership with Enron. According to Trial Staff, MPC's merchant sales to Enron included no transmission agreements or the use of any of MPC's

[8] Trial Staff notes that the motion and the December 19, 2003 letter agreement resolve the issues of this docket as well as any rehearing that LVCLP has pending.

[9] See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 1, 30, 45.

[10] The Master Agreement ran from December 21, 1999 until January 8, 2002. Trial Staff points out that, prior to December 1999, MPC was a jurisdictional public utility with the responsibility to provide certain transmission and ancillary services in accordance with its OATT. One of those ancillary services was system balancing. However, on December 17, 1999, MPC sold substantially all of its generating resources to PPL Montana, LLC (PPLM) but retained the obligation to provide hourly and moment-to-moment balancing between customer load and all available resources operating in the control area.

transmission rights.[11] Finally, Trial Staff points out that the record indicates that during the relevant time period, MPC did not trade in California power markets.[12]

13. As a result of these findings and the December 17, 2003 letter agreement between the California Parties and MPC,[13] Trial Staff requests that the Commission dismiss MPC from the show cause proceeding and terminate Docket No. EL03-194-000 subject to the conditions of the parties' letter agreement.

Docket No. EL03-198-000 – PECO Energy Company

14. In the Partnership Gaming Order, the Commission determined that PECO Energy Company (PECO) appeared to have, through a partnership, alliance, or other arrangement with PSCNM, facilitated False Import[14] in violation of the ISO and PX Tariffs and established Docket No. EL03-198-000.[15]

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[11] See Trial Staff Motion at P 3.3.

[12] See Trial Staff Motion at P 3.4.

[13] The December 17, 2003 agreement imposed conditions on MPC similar to those described above with respect to Docket No. EL03-191-000. In exchange for MPC's concessions, the California Parties agreed not to oppose Trial Staff's motion to dismiss. See supra note 6.

[14] In an order issued contemporaneously with the Partnership Gaming Order, the Commission described how a party could execute a False Import. It said:

> The essence of the False Import practice was to "park" day-ahead or day-of California energy with a company outside of California, buy it back for a small fee and then sell it to the ISO as "imported" out-of-market power. When power was parked under this practice, no power actually left the state of California. The reason for creating this fictional import was to take advantage of the fact that the ISO was making out-of-market purchases that were not subject to the price cap during real time whenever there was insufficient supply bid in its market. The ISO buyers responsible for obtaining the energy needed in the real-time market were willing to pay a price above the cap for energy imported from outside of California and accepted offers from sellers engaging in the False Import practice.

See Gaming Practices Order, 103 FERC ¶ 61,345 at P 38.

[15] See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 1, 30, 43-44, 45.

15. Trial Staff reviewed the record, including submissions by Exelon Corporation, the parent of Exelon Generation and PECO, and a December 4, 2003 letter agreement between PECO and the California Parties; the letter agreement is similar to the letter agreements in Docket Nos. ER03-191-000 and ER03-194-000.

16. Trial Staff concluded that, during the relevant period, PECO's purchases under the agreements it entered into with PSCNM were made from PSCNM's Palo Verde, Four Corners and San Juan supply portfolios and that PECO did not export power from California pursuant to its agreements with PSCNM. Further, Trial Staff noted that PECO made no sales to the ISO markets from May 1, 2000 through October 2, 2000 at prices in excess of the applicable price cap.[16] Instead, PECO took delivery of power purchased from PSCNM at points outside of California, and was able to schedule that power at multiple delivery points on the PSCNM system. Thus, Trial Staff concludes that PECO's transactions with PSCNM do not meet the definition of False Import.

17. Trial Staff, based upon its review and the parties' December 4, 2003 letter agreement, requests that the show cause proceeding against PECO be dismissed and that Docket No. EL03-198-000 be terminated, subject to the conditions of the parties' letter agreement.

Docket No. EL03-203-000 – Valley Electric Association, Inc.

18. In the Partnership Gaming Order, the Commission determined that Valley Electric Association, Inc. (Valley) appeared to have engaged, through a partnership, alliance, or other arrangement with Enron in Gaming Practices in violation of the ISO and PX tariffs and established Docket No. EL03-203-000.[17]

19. After examining the record, Trial Staff filed a motion to dismiss the show cause proceeding against Valley. Trial Staff bases its motion to dismiss on evidence that Valley: (1) participates in the wholesale markets only to purchase power to meet its load-serving obligations; (2) contracted with Enron for supplemental power needs for the period 2000 to 2006;[18] (3) received resource balancing and scheduling service from

[16] See Trial Staff Motion at P 2.3.

[17] See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 1, 30, 45.

[18] If Valley's load exceeded its contracted power purchases from Enron, Enron purchased additional power for resale to Valley at Enron's market cost. If Valley's load were less than its contracted power purchases from Enron, Valley did not take title to the "excess" power, but instead Enron marketed the power, sharing the savings and losses resulting from that remarketing. See Trial Staff Motion at P 3.3.

Enron which was included in the price of power sold by Enron to Valley; (4) did not participate in the ISO or PX markets; (5) did not authorize Enron to act as its agent when Enron purchased or sold power in the markets; (6) did not hire Enron as its Scheduling Coordinator in the ISO and PX markets; and (7) did not authorize Enron to submit bids or schedules to the ISO or PX on its behalf.[19]

20. Trial Staff notes that its Final Report and the California Parties' witness, Dr. Fox-Penner concluded that Enron contracted with Valley for the unlawful purpose of controlling Valley's resources in order to further Enron's Overscheduling Load in violation of the ISO and PX tariffs.[20] However, Trial Staff points out that while the record indicates that Enron may have used Valley to engage in the Overscheduling Load Gaming Practice, there is no evidence that Valley itself engaged in this practice or was aware that Enron was using its agreements with Valley to further Enron's Gaming Practices.[21]

21. Trial Staff also points out that the Commission concluded that it would not seek disgorgement of profits from market participants who engaged in Overscheduling Load.[22] Moreover, Valley and the California Parties have reached a December 10, 2003 letter agreement similar to the ones reached in the dockets discussed above.

Commission Determination Concerning Trial Staff Motions

22. We will grant Trial Staff's motions to dismiss. We agree with Trial Staff's assessment of the record in each docket and find that the respondents did not engage in prohibited gaming practices, as defined in the Gaming Practices Order, during the relevant time period. Moreover, the motions were not opposed subject to certain agreed-upon conditions.

23. We will therefore dismiss the above-captioned show cause proceedings against these respondents and terminate these dockets. However, as the respondents agreed to certain conditions in exchange for the California Parties' not objecting to the motions to dismiss, they will be required to honor those agreements.[23]

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[19] Id.

[20] Id. at P 3.4.

[21] Id. at P 3.5.

[22] See Gaming Practices Order, 103 FERC ¶ 61,345 at P 60.

[23] See CRC, 106 FERC ¶ 61,022 at P 52.

The Commission orders:

(A) Trial Staff's motions to dismiss are hereby granted, but the parties remain subject to the conditions agreed upon, as discussed herein.

(B) Docket Nos. EL03-191-000, EL03-194-000, EL03-198-000, and EL03-203-000 are hereby terminated.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.